

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ERIC CARLSON,

Plaintiff,

v.

LEWIS COUNTY HOSPITAL
DISTRICT No.1, a Washington
governmental entity; ROSS JONES, a
married man; JUDY RAMSEY, a
married woman; KENTON SMITH, a
married man; MARC FISHER, a married
man; SHANNON KELLY, a married
woman; SHERI HENDRICKS, a married
woman,

Defendants.

CASE NO. 15-5913 RJB

ORDER ON PLAINTIFF'S
MOTION FOR ORDER OF
PARTIAL SUMMARY
JUDGMENT AND VARIOUS
OTHER MOTIONS

This matter comes before the Court on the Plaintiff's Motion for Order of Partial Summary Judgment (Dkt. 38), the Defendants' opposition, or in the alternative, motion to delay the Plaintiff's motion under Fed. R. Civ. P. 56 (d) (Dkt. 54), and Defendants' Motion to Continue Trial Date and Extend Deadlines (Dkt. 62). The Court has considered the pleadings filed regarding the motions and the remaining record.

On December 15, 2015, Plaintiff, a gay man, filed this case asserting claims for violation of his procedural due process and equal protection rights under the U.S. Constitution (pursuant to

42 U.S.C. § 1983) and for violations of the Washington Law Against Discrimination, RCW 49.60, *et. seq.* (“WLAD”) in connection with the termination of his employment. Dkt. 1. Plaintiff seeks damages, attorney’s fees and costs. *Id.*

Pending before the Court is Plaintiff’s motion for partial summary judgment in which he moves for an order that: (1) Defendant Lewis County Hospital District No. 1 (“Hospital District”) violated Plaintiff’s rights under WLAD, (2) Plaintiff’s equal protections rights were violated, and (3) his procedural due process rights were violated. Dkt. 38. Defendants oppose the motion, arguing that it should be denied outright. Dkt. 54. If the motion is not denied at this point, Defendants move for a delay on consideration of the motion, pursuant to Fed. R. Civ. P. 56 (d), until the deposition of Seth Whitmer. Dkt. 54. For the reasons provided, the Plaintiff’s motion (Dkt. 38) should be denied as to his claims under the WLAD and equal protection clause, denied without prejudice as to his due process claims, and the Defendants’ Rule 56(d) motion regarding Plaintiff’s due process claims (Dkt. 54) should be granted. Defendants’ motion to continue the case deadlines (Dkt. 62) should be granted.

I. FACTS AND PENDING MOTIONS

A. FACTS

Plaintiff Eric Carlson was hired by the Hospital District as the Chief Financial Operator of Morton General Hospital (“Morton”) on November 21, 2014. Dkt. 51-1, at 11. Seth Whitmer, the Chief Executive Officer (“CEO”) of Morton, made the decision to hire Plaintiff the day he interviewed him. *Id.*, at 12. In his application, Plaintiff did not provide references from people for whom he had worked; the references listed were “character references.” Dkt. 51-1, at 17.

1 The Hospital District is governed by an elected board of commissioners (“board”), who
2 are the individually named Defendants here along with Shannon Kelly, the Human Resources
3 Director for Morton. Dkt. 55-1, at 77. The board hires and fires the CEO (that is the only
4 position for which they make personnel decisions), acts as a liaison between the hospital and the
5 community, and monitors the hospital’s finances. Dkt. 55-1, at 77. The CEO reports to the
6 board. Dkt. 55-1, at 78.

7 The parties dispute the state of Morton’s accounting system at the time Plaintiff was
8 hired. Plaintiff asserts it was “a disaster” (Dkt. 1) while Defendants state that there were
9 “challenges,” they deny that the accounting system was in as dire straits as asserted by Plaintiff
10 (Dkt. 10).

11 In December of 2014, Mr. Whitmer awarded Plaintiff a retention bonus. Dkt. 55-1, at 27.
12 This was not unusual, though, because Mr. Whitmer gave “bonuses to nearly every person he
13 hired.” Dkt. 55-1, at 27.

14 Plaintiff testified that a former employer, Dr. Floyd Smith, played a role in sabotaging his
15 position at Morton. Dkt. 55-1, at 9. Plaintiff states that he believes that Dr. Smith “started it,” in
16 fact. Dkt. 55-1, at 10. Plaintiff indicates that he believes that Dr. Smith contacted the “board of
17 directors and told them that not only was [he] a homosexual but that [he] was a fraudulent person
18 and that [he] somehow had this magical ability to send the hospital’s money around the world to
19 secret bank accounts and all sorts of stories.” Dkt. 55-1, at 9.

20 Defendant Shannon Kelly, the Human Resources Director for Morton, states that she
21 thinks that she was the first person to tell Mr. Whitmer about an opinion by a Western District of
22 Washington bankruptcy judge that Plaintiff may have been involved in a fraud. Dkt. 55-1, at 29.
23 That opinion is attached. In dicta, the opinion provides, in part: “[t]he Court believes there was
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1 a fraud perpetrated here, and [Plaintiff] Carlson was at least part of it. He was in difficult
2 financial straits . . . He saw an opportunity to obtain control over an elderly woman's finances,
3 and ultimately received \$300,000, money he used to finance his new venture." Dkt. 54, at 34. In
4 any event, Defendant Kelly became aware of this court opinion when she was contacted by
5 Diane Markham. Dkt. 55-1, at 29. Ms. Markham, the Executive Director of the Eastern Lewis
6 County Hospital Foundation, testified that she first heard about the bankruptcy opinion from
7 other foundation members. Dkt. 55-2, at 24-27. Ms. Markham told Defendant Kelly that the
8 document was publically available on the internet and that there were public "concerns." Dkt.
9 55-1, at 29. Defendant Kelly told Mr. Whitmer about the document, but she did not read it. Dkt.
10 55-1, at 29-30.

11 Defendant board member Kenton Smith first learned of the fraud allegation regarding
12 Plaintiff in the bankruptcy court's opinion a few weeks before Plaintiff was fired. Dkt. 55-1, at
13 79. Defendant Smith testified that:

14 An almost James-Bondish lady came up to me in church and was walking by me.
15 And I thought, well, I don't know the lady, but she's walking by me rather - - -
16 rather close to me, and she was carrying some papers. And as we walked by, she
17 slapped the papers under my arm, pulled my arm down, and said simply, "Read
18 this" and kept walking. . . And even a week or two later, her husband met me at
19 the door as I was leaving church . . . and he wanted to know if I had read those
20 papers that his wife had given me a week earlier.

21 Dkt. 55-1, at 79. Defendant Smith later learned that the couple's ("last name Ferch") adult
22 daughter was a nurse at a doctor's office in Packwood, Washington. Dkt. 55-1, at 80. The
23 record is not clear on the Ferch's connection with Plaintiff. Defendant Smith states that he read
24 the bankruptcy court's opinion and then contacted Mr. Whitmer. Dkt. 55-1, at 81. Defendant
Smith testified that he told Mr. Whitmer how he ended up getting the opinion and that "[he]

1 thought [Mr. Whitmer] should take a look at [the opinion] and that's all [Defendant Smith] said.”
2 Dkt. 55-1, at 81.

3 Defendant board member Marc Fisher states that around that time, he was in a hardware
4 store owned by Joy Watt. Dkt. 55-1, at 96. Ms. Watt called Defendant Fisher into her office and
5 handed him the bankruptcy court's opinion regarding Plaintiff, and said, “you better read [this].”
6 Dkt. 55-1, at 97. Defendant Fisher states that he did not read or discuss the document further
7 with Ms. Watt. Dkt. 55-1, at 98. He later read the opinion. Dkt. 55-1, at 98. Defendant Fisher
8 called Defendant Smith. Dkt. 55-1, at 98. Defendant Fisher states that he and Defendant Smith
9 felt that this was serious - they had “a man that committed a fraud heading our finance
10 department.” Dkt. 55-1, at 100.

11 Defendant board member Ross Jones states that he first learned of ethical concerns the
12 community had about Plaintiff's suitability for the CFO position at Morton through two
13 community members: Don Bishop and Glenn Allen. Dkt. 55-1, at 46-47. Both men referred
14 Defendant Jones to the bankruptcy judge's opinion. Dkt. 55-1, at 47. After reading the portion
15 of the opinion that discusses the bankruptcy court's belief in Plaintiff's participation in the fraud,
16 Defendant Jones contacted Defendant Fisher, who had also recently become aware of the
17 opinion, and they discussed it. Dkt. 55-1, at 48. Defendant Jones expressed his concern that
18 Plaintiff had engaged in “unethical behavior.” Dkt. 55-1, at 49.

19 Defendant board member Judy Ramsey states that Joy Watt also told her about the
20 bankruptcy court's opinion involving Plaintiff, and the next day, Defendant Fisher gave her a
21 copy. Dkt. 55-2, at 7. While she did not read the entire document, she read the portion that
22 discussed Plaintiff and allegations of fraud. Dkt. 55-2, at 6.

1 In a December 17, 2014 executive session, the board members (except Defendant board
2 member Sheri Hendricks who was in Arizona) discussed their concerns with Mr. Whitmer, about
3 the judicial opinion and community members' "grave concerns" that Plaintiff had engaged in
4 "unethical behavior" involving a fraud. Dkts. 55-1, at 50; 55-2, at 8-9. The board instructed Mr.
5 Whitmer to look into it further. Dkt. 55-2, at 9. The board did not order a private investigator be
6 hired. Dkt. 55-1, at 54. Further, each of the board members present at the meeting deny that any
7 discussion of Plaintiff's sexual orientation occurred, particularly as a reason to fire Plaintiff.
8 Dkts. 56, at 2; 57, at 2; 58, at 2; 59, at 2; and 61 at 2.

9 On December 24, 2014, Defendant board member Sheri Hendricks received an email
10 from Glenn Allen. Dkt. 55-1, at 58. She was in Arizona. Dkt. 39-6, at 5. Defendant Hendricks
11 testified that was the first time she heard that there was a fraud allegation against Plaintiff. Dkt.
12 55-1, at 58. Defendant Hendricks states that Mr. Allen attached the bankruptcy court's opinion
13 to the email. Dkt. 55-1, at 58. Defendant Hendricks read the opinion and then talked with
14 Defendant Fisher and Defendant Smith. Dkt. 55-1, at 59. She told both men she was concerned.
15 Dkt. 55-1, at 61.

16 Defendant Smith states that one evening, while Defendant Fisher was at his home, he
17 received a call from Dr. Floyd Smith. Dkt. 55-1, at 82. Dr. Smith, one of Plaintiff's prior
18 employers, wanted to discuss Plaintiff's employment at Morton. Dkt. 55-1, at 82 and 100. The
19 phone was placed on speaker. Dkt. 55-1, at 82 and 100. Dr. Smith told them that he lost money
20 to Plaintiff, and that "no matter what, [Plaintiff] should not be in a position where he could
21 handle money or accounts." Dkts. 55-1, at 82. Dr. Smith testified that while Plaintiff worked for
22 him, there were "financial irregularities," including "transfer of funds that couldn't adequately be
23 explained." Dkt. 55-2, at 14.

1 Defendants Smith and Fisher then called Mr. Whitmer. Dkt. 39-3, at 5. Defendant Fisher
2 states that he explained to Mr. Whitmer, “what we had,” and asked “what he [was] going to do
3 about it?” Dkt. 39-3, at 5. Defendant Fisher testified that he knew that Mr. Whitmer had the
4 bankruptcy judge’s opinion, but was “resisting,” and was not going to read it. Dkt. 39-3, at 5.
5 Defendant Fisher told Mr. Whitmer, “You have got to make a decision” about whether to keep
6 Plaintiff. Dkt. 39-3, at 5. In response to Mr. Whitmer’s concern that his job as CEO was at risk,
7 Defendant Fisher replied that “[w]ell I don’t know. I am just one vote.” Dkt. 55-1, at 110.

8 Dr. Smith testified that he received a call from Mr. Whitmer about Plaintiff. Dkt. 55-2, at
9 19. The record does not provide the date of the call, but it was after Dr. Smith talked with
10 Defendant Smith. Dkt. 55-2, at 19. Dr. Smith told Mr. Whitmer about his concerns regarding
11 the financial irregularities he thinks Plaintiff engaged in while handling Dr. Smith’s billing and
12 accounts, and gave him a list of other people that would have information about Plaintiff’s
13 financial misconduct. Dkt. 55-2, at 19.

14 Defendant Kelly testified that she was hesitant for them to terminate Plaintiff’s
15 employment. Dkt. 39-2, at 15. She states she “felt like [she] didn’t have enough information”
16 because the only information she had at the time was “[j]ust Seth [Whitmer] saying that he was
17 terminating [Plaintiff] because of this statement the judge made regarding fraud.” Dkt. 39-2, at
18 15. Defendant Kelly states that she did not talk with any of board members about the
19 termination of Plaintiff’s employment. Dkt. 55-1, at 31.

20 About December 28th or 29th, Mr. Whitmer called Defendant Hendricks (who was still in
21 Arizona) and asked whether she was aware of the fraud allegation in the bankruptcy opinion
22 involving Plaintiff. Dkt. 55-1, at 64. Defendant Hendricks told Mr. Whitmer that she read the
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1 opinion, was concerned about its implications, and had spoken to both Defendant Fisher and
2 Defendant Smith. Dkt. 55-1, at 64.

3 A little later, Mr. Whitmer called Defendant Hendricks again and told her that he was
4 “setting [the termination of Plaintiff’s employment] in motion.” Dkt. 55-1, at 70.

5 Around December 31, 2014, a hearing was held between Mr. Whitmer and Plaintiff. Dkt.
6 39-2. Defendant Kelly was there as a note taker. Dkt. 39-2, at 7. Shana Garcia (Mr. Whitmer’s
7 assistant) was also present, at Mr. Whitmer’s request, to “notate” Plaintiff’s “mannerisms and his
8 reactions” and to record his responses. Dkt. 55-2, at 33. Ms. Garcia testified that Plaintiff came
9 in and Mr. Whitmer gave Plaintiff an opportunity to share what he knew about the bankruptcy
10 case. Dkt. 55-2, at 34. Ms. Garcia states that Plaintiff “walked us through his side of the case”
11 and Mr. Whitmer asked him questions. Dkt. 55-2, at 35. According to Defendant Kelly, at that
12 meeting, Mr. Whitmer put Plaintiff on a leave of absence because “[Mr. Whitmer] was going to
13 look into it further and [Plaintiff] would have an opportunity to share information about that.”
14 Dkt. 55-1, at 31-32. Plaintiff testified that, at the first hearing, he told them he had not
15 committed fraud. Dkt. 55-1, at 18. They decided to meet again. Dkt. 55-1, at 32.

16 Plaintiff asked his attorney from the bankruptcy proceeding, Larry Fagerness, to contact
17 Mr. Whitmer, and explain what happened in the case. Dkt. 55-1, at 19. Plaintiff believes that
18 Mr. Fagerness did call Mr. Whitmer and gave him information about it. Dkt. 55-1, at 19.

19 On January 5, 2015, Mr. Whitmer held another hearing with Plaintiff. Plaintiff states that
20 at this hearing, he brought portions of the bankruptcy code to explain “why this was a completely
21 made-up thing.” Dkt. 55-1, at 19. He explained the general factual context in both hearings, and
22 at this second meeting, tried to show that he did not commit fraud under the bankruptcy code.
23 Dkt. 55-1, at 20. Ms. Garcia reports that Mr. Whitmer informed Plaintiff that due to the fraud
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1 allegation, he could no longer serve as CFO. Dkt. 55-2, at 38. Ms. Garcia states that Plaintiff
2 was not pleased. Dkt. 55-2, at 38. Plaintiff was told at this second hearing that Mr. Whitmer
3 would be “in touch.” Dkt. 55-1, at 34.

4 Plaintiff was then sent a letter terminating his employment. Dkt. 55-2, at 41. Plaintiff
5 acknowledges that the letter does not contain the word “fraud” and is merely “boilerplate”
6 language. Dkt. 51-1, at 21-22.

7 After the termination of Plaintiff’s employment at Morton, Mr. Whitmer related to the
8 board that he let Plaintiff go. Dkt. 55-1, at 61. Defendant Hendricks thought Mr. Whitmer
9 appeared “boastful” about firing Plaintiff. Dkt. 55-1, at 63. Each of the board members present
10 at the meeting deny that any discussion of Plaintiff’s sexual orientation occurred as a reason to
11 terminate his employment. Dkts. 56, at 2; 57, at 2; 58, at 2; 59, at 2; and 61, at 2.

12 After Plaintiff left Morton’s employ, Mr. Whitmer informed the board that he had hired a
13 computer company in order to determine whether Plaintiff had any “inappropriate computer
14 usage.” Dkt. 55-1, at 72. Defendant Hendricks testified that the only person she ever heard
15 express concerns about Plaintiff’s possible inappropriate computer usage was Mr. Whitmer.
16 Dkt. 55-1, at 73. Mr. Whitmer also advised the board to get Lifelock (a personal identity theft
17 protection service), and that he had done so as well. Dkt. 55-1, at 73.

18 The board fired Mr. Whitmer on March 11, 2015. Dkt. 20, at 2. Mr. Whitmer filed suit
19 against the Hospital District regarding the termination of his employment. Dkt. 25, at 22. Mr.
20 Whitmer then contacted Plaintiff and asked Plaintiff for an affidavit. Dkt. 25, at 22. Later, Mr.
21 Whitmer visited Plaintiff at Plaintiff’s home to discuss Plaintiff providing an affidavit and the
22 circumstances of Plaintiff’s firing. Dkt. 25, at 22. Mr. Whitmer later provided Plaintiff an
23 affidavit. Dkt. 25, at 22.

1 In support of his instant motion for partial summary judgment, Plaintiff relies on this
2 affidavit by Mr. Whitmer, which was originally filed in support of Plaintiff's motion to compel.
3 Dkt. 20. In this affidavit, Mr. Whitmer asserts that the "[b]oard members told me they did not
4 want a homosexual working at 'their' hospital." Dkt. 20, at 7. He maintains that "[t]he board
5 members knew they could not force me to fire someone based on sexual orientation. Therefore,
6 the [board] hired private investigators to dig up any old dirt on Mr. Carlson so the [board] would
7 have a 'reason' to force me to fire Eric Carlson." Dkt. 20, at 8. He alleges that "[e]ventually, the
8 [board] members found an old court case regarding a business Mr. Carlson had owned." Dkt. 20,
9 at 8. Mr. Whitmer states that he objected to terminating Plaintiff's employment. Dkt. 20, at 9.
10 According to Mr. Whitmer, "under duress" from the board, he consulted Morton's attorney, Julie
11 Kebler, of the law firm Garvey Schubert Barer, regarding the legality of firing Mr. Carlson. Dkt.
12 20, at 8. He alleges that "[a]fter an extensive review of the situation, [Morton]'s attorney
13 advised that [Morton] use Mr. Carlson's prior bankruptcy and a court case in which a judge
14 mentioned that Mr. Carlson 'may' have committed fraud . . . (but there was no evidence of a
15 fraud) as a pretext for firing him." Dkt. 20, at 8. Mr. Whitmer asserts that he "was given a
16 regimented process to follow as Mr. Carlson had no performance issues and it was well known
17 regarding the [board's] and communities' dislike for Mr. Carlson being homosexual." Dkt. 20,
18 at 8. Mr. Whitmer claims that the attorneys advised him to place Mr. Carlson on administrative
19 leave "to make it appear an investigation was being conducted so Mr. Carlson would hopefully
20 not bring a wrongful termination and discrimination suit against the hospital." *Id.*, at 9. He
21 maintains that no investigation was conducted and there was never any intention to do so. *Id.*
22 Under threats from the hospital's board regarding the security of his own job, Mr. Whitmer states
23 that he was forced to fire Plaintiff "because of his sexual orientation." *Id.*
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1 Defendant Ramsey directly disputes Mr. Whitmer's assertion in his affidavit that she did
2 not like Plaintiff or that she "expressed distaste in placing a homosexual man in a role as a
3 member of leadership" at Morton. Dkt. 56, at 1-2. She states that she did not instruct Mr.
4 Whitmer to terminate Plaintiff's employment based on his sexual orientation and did not make
5 any of the statements that Mr. Whitmer attributes to the "board." Dkt. 56, at 2. Defendant
6 Ramsey states that she did not hear any of the other board members make any of these
7 statements. Dkt. 56, at 2. She did not hire an investigator to look into Plaintiff's background.
8 Dkt. 56, at 2.

9 Defendant Smith states that he did not make the statements Mr. Whitmer attributes to him
10 or the "board" in the Whitmer affidavit regarding Plaintiff's sexuality. Dkt. 57, at 1. He denies
11 accusing Plaintiff of pedophilia or participation in the sex trade. Dkt. 57, at 1. Defendant Smith
12 states that he has a friend who is a private investigator who looked into Plaintiff on an unrelated
13 matter. Dkt. 57, at 2. Defendant Smith states that his friend warned him about the Plaintiff and
14 then Defendant Smith passed on what his friend told him to the other board members. Dkt. 57,
15 at 2. Defendant Smith denies ever hiring an investigator to look into Plaintiff's background. Dkt.
16 57, at 2. Defendant Smith states that he did not instruct Mr. Whitmer to fire Plaintiff based on
17 his sexual orientation. Dkt. 57, at 2.

18 Defendant Fisher also directly disputes that he made any statement in the Whitmer
19 affidavit regarding Plaintiff's sexual orientation. Dkt. 58, at 1-2. He states that he did not hire a
20 private investigator to look into Plaintiff's background, and he did not tell Mr. Whitmer that he
21 had done so to find an excuse to terminate Plaintiff's employment. Dkt. 58, at 1-2. Defendant
22 Fisher denies ordering Mr. Whitmer to fire Plaintiff based on his sexual orientation. Dkt. 58, at
23 2. He did not hear any other member of the board do so either. Dkt. 58, at 2.

1 Defendant Jones states that he did not make any of the statements Mr. Whitmer's
2 affidavit asserts Defendant Jones (or the "board") made regarding Plaintiff's sexuality. Dkt. 59,
3 at 1. Defendant Jones states that he had a "good impression" of Plaintiff after the first time he
4 met him. Dkt. 59, at 2. He did not instruct Mr. Whitmer to fire Plaintiff based on his
5 homosexuality. Dkt. 59, at 2.

6 Defendant Hendricks denies that she made any of the statements regarding Plaintiff's
7 sexuality attributed to her in the Whitmer affidavit. Dkt. 61. She did not instruct him to fire
8 Plaintiff because he was a homosexual. Dkt. 61, at 2. Defendant Hendricks explains that one of
9 her close family members is lesbian. Dkt. 61, at 2. She states there was no discussion of
10 Plaintiff's sexual orientation. Dkt. 61, at 2. She that she "would have objected" if there had
11 been any negative comments about Plaintiff's homosexuality or the LGBTQ community. Dkt.
12 61, at 2.

13 Defendant Human Resources Director Kelly also directly disputes that she ever stated
14 that she had "concerns" about Plaintiff's sexual orientation. Dkt. 60, at 1. She states that she
15 had several conversations regarding the termination of Plaintiff's employment, and at no point
16 did anyone make any mention of Plaintiff's homosexuality or make any negative statement about
17 gay people. Dkt. 60, at 2. Defendant Kelly states that her conversations with Mr. Whitmer and
18 Ms. Markham concerned the bankruptcy opinion and the fraud allegation. Dkt. 60, at 3.
19 Defendant Kelly asserts that Mr. Whitmer never told her the board was pressuring him to fire
20 Plaintiff because of Plaintiff's sexuality. Dkt. 60, at 3.

21 Defendant Jones had the impression that Mr. Whitmer fired Plaintiff because of "past
22 experiences" involving the "court case" that created an "ethical concern in the community,"
23 (Dkt. 55-1, at 45), but that it was Mr. Whitmer's job to fire employees, so Defendant Jones
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1 “really didn’t know” (Dkt. 39-7, at 13). Defendant Fisher also states that he had no information
2 that Plaintiff was fired for any other reason than the fraud allegations and complaints in the
3 community about Plaintiff. Dkt. 55-1, at 104. Defendant Ramsey also testified that although she
4 specifically didn’t know why Plaintiff was fired, based on the conversation at the executive
5 session about Plaintiff’s possible involvement in a fraud, she assumed Mr. Whitmer fired
6 Plaintiff because of the allegations of fraud. Dkt. 55-2, at 10. Ms. Markham states that Mr.
7 Whitmer told her he fired Plaintiff and that she had no reason to believe that it was not related to
8 the fraud allegation. Dkt. 55-2, at 29.

9 **B. PENDING MOTIONS AND ORGANIZATION OF THE DECISION**

10 In his pending motion, Plaintiff moves for an order that the Hospital District violated his
11 rights under WLAD because Plaintiff was fired for being gay. Dkt. 38. Plaintiff asserts that it is
12 undisputed that Mr. Whitmer was the only person who could fire Plaintiff and Mr. Whitmer
13 states that he did so under pressure from the board due to Plaintiff’s homosexuality. *Id.*, at 11.
14 Plaintiff moves for an order that his equal protection rights were violated by the Hospital District
15 because he was fired based on his sexual orientation. *Id.*, at 13. (While this portion of his motion
16 is entitled “D. Mr. Carlson’s Substantive Due Process rights Were Violated” he proceeds to
17 discuss his equal protection claim; he also states in his Reply that his constitutional claims
18 related to a name-saving hearing are not before the Court.) Plaintiff argues that “there is no
19 dispute that Plaintiff was fired because he was gay.” *Id.* He asserts that the board “encouraged
20 his firing and voiced their approval after the fact.” *Id.*, at 14. Plaintiff argues that the board
21 ratified Mr. Whitmer’s decision to fire Plaintiff at the January 6, 2015 board meeting. *Id.*
22 Plaintiff also seeks an order granting summary judgment in his favor that his procedural due
23 process rights were violated. *Id.*

1 Defendants oppose the motion, arguing that there are issues of fact as to whether Plaintiff
2 was terminated due to his sexual orientation, and so his motion that he is entitled to summary
3 judgment on his WLAD and equal protection claims should be denied. Dkt. 54. Defendants
4 argue that Plaintiff's motion for summary judgment should be denied as to his due process claim
5 because he was not entitled to a name-clearing hearing and the two hearings held were sufficient.
6 *Id.* To the extent that Plaintiff does make a due process claim that he is entitled to a name-
7 clearing hearing, Defendants move for summary dismissal. *Id.* In the alternative to denial of the
8 Plaintiff's motion for summary judgment, the Defendants move the Court to defer consideration
9 of the motion under Fed. R. Civ. P. 56(d). *Id.*

10 In reply, Plaintiff states that he "disagrees with the majority of the factual assertions
11 made by the Defendants." Dkt. 64. He argues that he was not an at-will employee, was entitled
12 to a *Loudermill* hearing, and that hearings he was given were inadequate. *Id.* Plaintiff points to
13 provisions of the Lewis County Washington employee's handbook. *Id.* He asserts that he is
14 entitled to a name clearing hearing, but that question is not yet before the Court. *Id.* Plaintiff
15 argues that the District is bound by Mr. Whitmer's statements as to why he fired Plaintiff
16 because he is the only person with personal information, and so summary judgment should be
17 granted to Plaintiff on his WLAD and equal protection claims. *Id.*

18 Plaintiff also raises issues regarding Defendants' responses to interrogatories. Dkt. 38
19 and 64. Plaintiff does not make a motion related to these discovery requests, so no action will be
20 taken on these issues.

21 Defendants file a surreply, and point out that, in regard to his due process claim,
22 Plaintiff's reliance on the Lewis County, Washington employee's handbook is in error. Dkt. 71.
23 Plaintiff worked for the Hospital District, which is a separate entity from Lewis County,
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1 Washington. Dkt. 72. The Lewis County, Washington employee's handbook does not apply to
 2 employees of the Hospital District. *Id.*

3 Defendants also have pending a Motion to Continue Trial Date and Extend Deadlines
 4 (Dkt. 67) in which they move to have the trial date continued until May 22, 2017 and have the
 5 discovery and dispositive motions deadlines extended. Dkt. 62. Plaintiff does not oppose the
 6 motion, but indicates that his counsel is unavailable for the May 22, 2017 trial date. Dkt. 67.

7 This decision is organized as follows: it will first provide the standard on summary
 8 judgment, then address Plaintiff's motion for summary judgment on his claims for violation of
 9 the WLAD and the Equal Protection Clause of the U.S. Constitution, then the cross motions on
 10 Plaintiffs' claim for violation of his due process rights will be handled jointly with Defendants'
 11 motion under Rule 56 (d), and lastly, the Defendants' motion to extend case deadlines.

12 **II. DISCUSSION**

13 **A. SUMMARY JUDGMENT STANDARD**

14 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
 15 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
 16 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
 17 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
 18 showing on an essential element of a claim in the case on which the nonmoving party has the
 19 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
 20 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
 21 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
 22 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some
 23 metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a
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1 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
 2 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
 3 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
 4 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

5 The determination of the existence of a material fact is often a close question. The court
 6 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
 7 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
 8 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
 9 of the nonmoving party only when the facts specifically attested by that party contradict facts
 10 specifically attested by the moving party. The nonmoving party may not merely state that it will
 11 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
 12 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
 13 Conclusory, nonspecific statements in affidavits are not sufficient, and “missing facts” will not
 14 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

15 **B. PLAINTIFF’S STATE LAW CLAIM FOR VIOLATION OF WLAD**

16 Under the WLAD, “[i]t is an unfair practice for any employer to . . . discharge or bar any
 17 person from employment because of age, sex, marital status, sexual orientation, [or] race . . .”
 18 RCW 49.60.180 (2). In Washington, “disparate treatment occurs when an employer treats some
 19 people less favorably than others because of race, color, religion, sex, or other protected status.”
 20 *Alonso v. Qwest Commc’ns Co., LLC*, 178 Wash. App. 734, 743-44, 315 P.3d 610, 615-16
 21 (2013)(*internal citation omitted*). A plaintiff claiming a violation of the WLAD, “may establish
 22 a prima facie case by either offering direct evidence of an employer's discriminatory intent, or by
 23 satisfying the *McDonnell Douglas* burden-shifting test that gives rise to an inference of
 24

1 discrimination.” *Id.*, at 744 (citing *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wash. App. 212,
2 226, 907 P.2d 1223 (1996) and *Kastanis v. Educ. Emps.’ Credit Union*, 122 Wash.2d 483, 491,
3 859 P.2d 26, 865 P.2d 507 (1993).

4 Plaintiff’s motion for summary judgment on his WLAD claim should be denied. There are
5 issues of fact regarding Plaintiff’s direct evidence of discrimination. Plaintiff points to Mr.
6 Whitmer’s statements, in his affidavit, that he was forced to fire Plaintiff due to Plaintiff’s sexual
7 orientation. There are issues of fact as to whether Mr. Whitmer was forced by the board to fire
8 Plaintiff due to his homosexuality. All of the board members deny that they pressured Mr.
9 Whitmer to terminate Plaintiff’s employment due to his homosexuality, or even that Plaintiff’s
10 sexual orientation was ever discussed. While Plaintiff asserts that Mr. Whitmer was the only
11 person with personal information as to why Plaintiff was fired, if viewed in a light most
12 favorable to Defendants, the record demonstrates that the board was concerned over Plaintiff’s
13 possible role in a fraud and that community members, like Dr. Smith, were complaining about
14 Plaintiff’s suitability to both the board and Mr. Whitmer. The Defendants argue that Plaintiff’s
15 sexual orientation was not the basis for the board’s actions. While the facts may be viewed as
16 supporting Mr. Whitmer’s assertion that he was receiving pressure from the board to fire
17 Plaintiff, there are issues of fact as to why he was being pressured to do so. This question will
18 turn on the credibility of the witnesses, including the credibility of Mr. Whitmer, who has his
19 own issues with the Defendants.

20 To the extent that Plaintiff argues that he is entitled to summary judgment based on an
21 inference of discrimination, his motion should be denied. In the first step of the *McDonnell*
22 *Douglas* test, a plaintiff must establish a prima facie case of discrimination. *McDonnell Douglas*
23 *Corp. v. Green*, 411 U.S. 792 (1973). A plaintiff must establish that (1) they belong to a
24

protected class, (2) they were qualified for the position (they were performing their job in a satisfactory manner), (3) they were subjected to an adverse employment action, and (4) they were replaced by or were treated more favorably than a person outside the protected class. *McDonnell Douglas* at 802. In the second step, the defendant employer then must show a legitimate nondiscriminatory reason for the termination. *McDonnell Douglas* at 802. In the last step of the *McDonnell Douglas* test, “should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *McDonnell Douglas* at 802.

As to the first step, Plaintiff has offered evidence that he is gay, he was qualified for the position, and he was fired. There is no evidence in the record that he was replaced by a person outside his protected class. Even if there was such evidence, under the second step of the *McDonnell Douglas* test, the Hospital District has offered evidence from which a jury could infer that Plaintiff was fired due to the fraud allegations in the bankruptcy court’s opinion and complaints from citizens like Dr. Smith. As to the last step, Plaintiff has offered evidence to rebut Defendants’ evidence, that is, Mr. Whitmer’s affidavit where he asserts that the board forced him to fire Plaintiff due to his sexual orientation, which of course, the Defendants dispute. Each of these witnesses’ credibility is at issue and should be decided by a trier of fact. Plaintiff’s motion for judgment summarily in his favor on the WLAD claim should be denied.

C. PLAINTIFF’S CLAIMS FOR VIOLATION OF HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION PURSUANT TO 42 U.S.C. § 1983

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or

1 laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other*
 2 *grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to
 3 remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769
 4 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

5 Under 42 U.S.C. § 1983, a plaintiff must set forth the specific factual bases upon which
 6 he claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).
 7 Vague and conclusory allegations of official participation in a civil rights violations are not
 8 sufficient to support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir.
 9 1982). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of
 10 supervisory responsibility or position. *Monell v. New York City Dept. of Social Services*, 436
 11 U.S. 658, 694 n.58 (1978); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

12 The precise nature of Plaintiff's constitutional claims (particularly against whom they are
 13 asserted) is unclear. To the extent that Plaintiff is making constitutional claims against the
 14 individually named Defendants, in their personal capacities, his motion for summary judgment
 15 should be denied. He does not argue or make any showing that he is entitled to summary
 16 judgment against them in their individual capacities on his constitutional claims.

17 Plaintiff does assert and argue constitutional claims against the Hospital District in his
 18 briefing. This opinion will now turn to addressing the Hospital District's potential liability under
 19 § 1983.

20 A county or municipality is responsible for a constitutional violation only when an action
 21 taken pursuant to a county or municipal policy of some nature caused the violation. *Monell v.*
 22 *Dep't of Soc. Servs.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In order to
 23 successfully plead §1983 liability on the part of the Hospital District, Plaintiff must allege: (1) he
 24

1 was deprived of a constitutional right; (2) the Hospital District had a policy, practice, or custom;
 2 (3) the policy, practice or custom amounted to a deliberate indifference to his constitutional
 3 rights; and (4) the policy, practice or custom was the moving force behind the constitutional
 4 violation. *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–11 (9th
 5 Cir. 2001)(*internal quotations omitted*). The Ninth Circuit recognizes three ways to demonstrate
 6 a municipal policy, practice or custom:

- 7 (1) the constitutional tort was the result of a longstanding practice or custom
 which constitutes the standard operating procedure of the local government entity;
- 8 (2) the tortfeasor was an official whose acts fairly represent official policy such
 that the challenged action constituted official policy; or (3) an official with final
- 9 policy-making authority delegated that authority to, or ratified the decision of, a
 subordinate.

10 *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008)(*internal citations and quotations omitted*).

11 Plaintiff does not contend that his constitutional rights were violated as a result of “a
 12 longstanding practice or custom which constitutes the standard operating procedure.”

13 Accordingly, only the last two forms of policy, practice, or custom is relevant here. This opinion
 14 will now look at Plaintiff’s constitutional claims for violation of his equal protection rights.

15 The Fourteenth Amendment, provides, in part, that no State shall “deny to any person
 16 within its jurisdiction, the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The
 17 Equal Protection Clause proscribes “any purposeful discrimination by state actors, be it in the
 18 workplace or elsewhere, directed at an individual solely because of the individual's membership
 19 in a protected class.” *Lindsey v. Shalmy*, 29 F.3d 1382, 1386 (9th Cir. 1994). “To state a claim
 20 for violation of the Equal Protection Clause, a plaintiff must show that the defendant acted with
 21 an intent or purpose to discriminate against him based upon his membership in a protected
 22 class.” *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003) (*citing Barren v. Harrington*,
 23 152 F.3d 1193, 1194 (9th Cir.1998)).
 24

1 There are issues of fact as to whether Plaintiff was deprived of his constitutional rights
 2 under the Equal Protection Clause because there are issues of fact as to whether he was fired due
 3 to his sexual orientation. The Court need not reach the question of whether the Hospital District
 4 had a policy, practice, or custom; whether the policy, practice or custom amounted to a deliberate
 5 indifference to his constitutional rights; or whether the policy, practice or custom was the
 6 moving force behind the constitutional violation. Plaintiff's motion for summary judgment on
 7 his equal protection claim should be denied.

8 **D. CROSS MOTIONS ON PLAINTIFF'S CLAIMS UNDER THE DUE PROCESS**
 9 **CLAUSE AND DEFENDANTS' MOTION UNDER RULE 56(d)**

10 To the extent that both parties moved for summary judgment on Plaintiff's due process
 11 claims, the motions should be denied without prejudice, to be renoted, if appropriate. The exact
 12 nature of these claims, and against whom they are asserted, is less than clear from the motions.
 13 There is some conflation of procedural due process and substantive due process. In any event, it
 14 is clear that the deposition of Mr. Whitmer is necessary to resolve dispositive motions, if any,
 15 regarding these claims.

16 Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified
 17 reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer
 18 considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take
 19 discovery; or (3) issue any other appropriate order." A party requesting relief pursuant to Rule
 20 56(d) "must identify by affidavit the specific facts that further discovery would reveal, and
 21 explain why those facts would preclude summary judgment." *Tatum v. City and County of San*
 22 *Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006).

23 The Defendants' Rule 56(d) motion (Dkt. 54) should be granted as to Plaintiff's due process
 24 claim. Dispositive motions regarding this claim may be renoted, if appropriate, after the

1 conclusion of Mr. Whitmer's deposition. The Defendants have sufficiently shown specific facts
2 that further discovery would reveal and has explained why those facts may preclude summary
3 judgment. *Tatum*, at 1100.

4 **E. DEADLINES**

5 On December 14, 2016, the Plaintiff's motion for an order finding that Defendants waived
6 the attorney-client privilege was granted. Dkt. 28. (Plaintiff's motion was filed on the last day
7 such motions were allowed under the case schedule). That order granted the Plaintiff's motion to
8 compel the Defendants to respond to Plaintiff's First Interrogatories and Requests for Production
9 and produce all documents related to the evaluation of how to terminate Plaintiff's employment,
10 including those that contained the advice of counsel. *Id.* The December 14, 2016 Order noted
11 that there may be issues regarding Washington's Rules of Professional Conduct ("RPC") 3.7
12 "Lawyer as Witness," and perhaps others, including RPC 1.7 "Conflict of Interest: Current
13 Clients," for the Defendants' lawyers, and gave the Defendants' counsel until January 9, 2017 to
14 inform the Court of whether they intended continue in the case. *Id.* Both parties were also
15 ordered to inform the Court by January 9, 2017 as to whether extension of the remaining case
16 deadlines is appropriate. *Id.*

17 The Defendants then moved for reconsideration and/or clarification of that order. Dkt. 29.
18 The Defendants argue that the Court based its conclusions on the "false premise" that Mr.
19 Whitmer accurately described his communications with the hospital's lawyers, and request that
20 the Court conduct an *in camera* review of the documents at issue. *Id.* After allowing Plaintiff to
21 respond, the Court did conduct an *in camera* review of the documents at issue. The motion for
22 reconsideration (Dkt. 29) was noted for consideration on January 13, 2017.

1 On January 17, 2017 a hearing was held regarding the motion for reconsideration and
2 argument was heard on whether the attorney client privilege had been breached. Dkt. 51. The
3 parties were informed that while the Court did not find anything discoverable in the documents
4 provided *in camera*, no final decision on the motion for reconsideration could be made until after
5 the deposition of Mr. Whitmer. Dkt. 68, at 3-4 and 19-25. Parties at the hearing indicated that
6 they were hoping to take Mr. Whitmer's deposition in February, but no date had been set. Dkt.
7 68, at 26.

8 On January 26, 2017, Defendants filed the instant Motion to Continue Trial Date and Extend
9 Deadlines. Dkt. 62. Defendants state in their motion that although both parties have been
10 attempting to schedule Mr. Whitmer's deposition (who lives out-of-state), his attorney is not
11 responding, and they have not yet been able to set up a date for it. *Id.* Defendants move for an
12 extension of the discovery and dispositive motions deadlines and of the trial date, which is set for
13 March 13, 2017. *Id.* Defendants request that the discovery deadline be moved to March 13,
14 2017, the dispositive motions deadline be moved to April 3, 2017 and the trial date be moved to
15 May 22, 2017. *Id.*

16 Plaintiff generally agrees to the extension, but, his counsel states that he is unavailable for a
17 May 22, 2017 trial date. Dkt. 67. He states that he "has a number of matters scheduled
18 throughout the spring, summer, and into the fall of 2017" and proposes parties submit proposed
19 dates for the trial. *Id.*

20 Deadlines need to be set in this case. Defendants' motion for an extension of time should be
21 granted. Trial should be reset to begin on May 22, 2017 at 9:30 a.m. The case deadlines should
22 be reset as follows:

- 23 • Discovery completed by 3/17/2017,

- Dispositive motions due by 4/3/2017,
- Motions in Limine due by 4/24/2017,
- Pretrial Order due by 5/5/2017,
- Pretrial Conference set for 5/12/2017 at 08:30 a.m.,
- Trial briefs to be submitted by 5/12/2017, and
- Proposed voir dire/jury instructions due by 5/12/2017.

If Plaintiff's counsel still has a conflict two weeks from the above trial date, he should inform the Court, in writing, explaining the nature of the conflict, to receive assistance in resolving it.

Further, the Defendants' motion for reconsideration (Dkt. 29) should be renoted for February 28, 2017.

III. ORDER

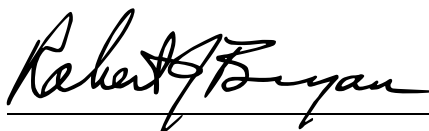
Accordingly, it is **ORDERED** that:

- Plaintiff's Motion for Order of Partial Summary Judgment (Dkt. 38) **IS**:
 - **DENIED** as to Plaintiff's claims under the Washing Law Against Discrimination and Equal Protection Clause of the U.S. Constitution,
 - **DENIED WITHOUT PREJUDICE** as to Plaintiff's Due Process claims;
- Defendants' motion for summary judgment on Plaintiff's Due Process claims (Dkt. 54) **IS DENIED WITHOUT PREJUDICE**;
- Defendants' Motion to Continue Trial Date and Extend Deadlines (Dkt. 62) **IS GRANTED**; the following deadlines are **RESET**:
 - Trial should be reset to begin on May 22, 2017 at 9:30 a.m.
 - Discovery completed by 3/17/2017,
 - Dispositive motions due by 4/3/2017,

- Motions in Limine due by 4/24/2017,
- Pretrial Order due by 5/5/2017,
- Pretrial Conference set for 5/12/2017 at 08:30 a.m.,
- Trial briefs to be submitted by 5/12/2017, and
- Proposed voir dire/jury instructions due by 5/12/2017;
- The Defendants' Motion for Reconsideration (Dkt. 29) **IS RENOTED** for February 28, 2017.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 7th day of February, 2017.



ROBERT J. BRYAN
United States District Judge